Supreme Court, U.S.
FILED
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OFFICE OF THE

No. _

SUPREME COURT OF THE UNITED STATES

FREDERICK HAYES, JUNIOR,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First: Whether the application of the California aiding and abetting law relieved the State of California from establishing mens rea of the petitioner, a necessary element of a criminal offense of which the petitioner was charged and whether the failure of the prosecution to prove the " target offense ", violated the petitioners due process rights under the Sixth and Fourteenth Amendment to the Constitution of the United States.

Second: Whether the District Court and Ninth Circuit Court of Appeals improperly denied the petitioner a certificate of appealability.

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1.

JURISDICTION

The Petitioner was charged on July 8th, 1994 in a complaint filed in the Municipal Court of the County of Riverside with the target crimes of discharging a weapon from a motor vehicle, California Penal Code 12034 (d) and permitting the firing of a weapon from a vehicle California Penal Code 12034 (b) and the crimes of attempted murder, four counts, race enhancements, great bodily injury enhancements, personal firearm use enhancement. The prosecution charged the petitioner with aiding and abetting the firing of a weapon from a vehicle and that the attempted murders were the natural and probable consequences of the firing of the weapon[1] Petitioner was held to answer and trial for Petitioner and a co-defendant, was conducted, before a jury, in the Superior Court of the State of California for the County of Riverside beginning on March 22nd, 1995, before

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[1]. It is noteworthy that the petitioner was not convicted of the aiding and abetting of the firing of the weapon but, under the natural and probable cosequences doctrine, of attempted murder.

the Honorable Edward D. Webster. The Petitioner was found guilty on all four counts of attempted murder and the jury found that the attempted murders were willful, deliberate and premeditated. that the race enhancement was true. The jury did not agree on the great bodily injury enhancement and personal firearms use as against the Petitioner and those enhancements were dismissed by the Court [2] The jury did not return a verdict against the petitioner on the predicate, target, offenses. California Penal Code §§ 12034 (b) and 12034 (d). On May 5, 1995, the petitioner was sentenced to four consecutive indeterminate life terms, with the possibility of parole on the four attempted murder convictions, plus three years on each of the race enhancements, hate crimes, for a total of 12 years to be served consecutively.

Petitioner appealed to the Court of Appeals, Fourth Appellate District, Division Two. The conviction was affirmed in a partial publication opinion filed February 26, 1997. A Petition for Review addressed to the California

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2. The jury clearly determined that the Petitioner was not the direct perpetrator. The Magistrate in her report concurs. Page 8, footnore 5 of the Report and Recommendation of the Magistate.

Supreme Court was denied on March 18th, 1997 Petitioner is currently in the custody of the Department of Corrections of the State of California at Calipatria State Prison .

Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California, Riverside Branch on February 23rd, 1998. . On September 30th, 2002, The Honorable Margaret A. Nagle, Magistrate Judge, filed a Report and Recommendation that the petition be denied and the petition dismissed, a copy of which appears in the appendix as item # 1.[3] The Honorable Robert J. Timlin United States District Judge accepted the recommendation and denied the writ and dismissed the petition.

Within the time set forth in Federal Rules of Appellate Procedure, Rule 4, the petitioner filed a Notice of Appeal and petitioned the District Judge for a Certificate of Appealability. On November 20, 2002, the Honorable Robert J. Timlin, issued an order denying a certificate of appealability. The petitioner then petitioned the Ninth

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[3]Petitioner frequently refers to the very thoughful Report and Recommendation of the Magistrate which contains impartial simmary of the facts.

Circuit Court of Appeals for a Certificate of Appealability. (COA) .(appendix # 2) By order of March 18, 2003, the Court of Appeals deferred its decision on the Petition for a COA until the California Supreme Court issued its decision in the matter of People v. Lee 20 P. 3d 1085 (2001, California Court of Appeals) (appendix # 3 The California rendered a decision in that matter People vs. Lee, 74 P. 3d 176 (California Supreme Court 2003) The United States Court of Appeals for the Ninth Circuit then denied the petition for the COA[4].

2.

CONSTITUTIONAL PROVISIONS

This petition is based on the petitioner's due process rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

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FACTUAL STATEMENT OF THE CASE[5]

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4. The Court of Appeals for the Ninth Circuit apparently held that the decision of the California Supreme Court in People vs. Lee was determinative of the matter. Petitioner disagrees.

5. A more detailed discussion of the facts is set forth in the Report and Recommendation of the Magistrate

On July 5, 1994 about 3:00 o'clock P. M Venus Blankenship and Nominick Hayes were at an Arco gas station in Riverside. Four Hispanic males in a vehicle parked in the station. Two Hispanic males from the vehicle and one who came into the area on a bicycle approached Nominick. After a brief discussion in which gang references were made Nominick was struck with a beer bottle after which he ran from the area. About 5:00 o'clock P. M., of the same day the defendants (Petitioner and Ventrice Lajuan Laster, the co-defendant, who are Afro - American) borrowed a car and went looking for Nominick. Mr. Laster was driving the vehicle and stopped and picked up two other unidentified afro - American males individuals. They set out to find Nominick. At some point they came to the school yard where this incident took place. When the vehicle stopped at a traffic signal, adjacent to a school yard where several Hispanic individuals were engaged in sports and other activities, the passenger in the rear right seat of the vehicle fired several shots into the school yard. The individual who

fired the shots was never identified by the police or apprehended[6].

The jury found that the petitioner was not the shooter. the jury did not agree on the great bodily injury enhancement and personal firearms use as against the Petitioner and those enhancements were dismissed by the Court. The petitioner was charged as a person who aids or abetts the crime. The jury was instructed that a person who with knowledge of the criminal purpose of the direct perpetrator and with an intent or purpose either of committing, or of encouraging or aiding the commission of a crime is guilty as an aider and abettor. No instruction was given with respect to the mens rea of the petitioner.

4.

Reason for Ganting

A United States Court of Appeals had declined to decide an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court.

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6. United States vs. Powell, 806 F 2d 1421 (9th Cir 1986) is not applicable. Powell was concerned with odometer reading tampering a general intent crime not attempted murder, a specific intent crime

The issue raised in this petition relate to the operation of the aider and abettor doctrine coupled with the natural and probable consequences to permit the conviction of a defendant without proof of every essential element of the offense Great mischief ensues from the current application of these doctrine and defendants, including the petitioner, have been wrongfully convicted in violation of their constitutional rights.

4.A

FIRST ISSUE
FAILURE TO PROVE EVERY ELEMENT

Although the jury found the petitioner guilty he is, in fact, factually innocent. The undisputed evidence is that the petitioner was a passenger in an automobile; that the driver of the vehicle picked up two other individuals who were strangers to the petitioner, who were then seated in the rear of the passenger area (back seat); that the individuals in the back seat were unknown to the petitioner; that no significant conversation took place between petitioner and the individuals in the back seat. On the basis of these facts alone the jury was permitted to find that the petitioner aided and

abetting the firing of a weapon from a vehicle; that the attempted murder was the natural and probable consequences; and that intent to kill was established

SPECIFIC INTENT, MENS REA, IS A FUNDAMENTAL AND NECESSARY ELEMENT OF THE OFFENSE FOR WHICH THE PETITIONER WAS CONVICTED. THE PROSECUTION IMPROPERLY RELIED ON THE FACT THAT THE TARGET OFFENSE HAD BEEN COMMITTED TO ESTABLISH INTENT. MENS REA. NOR DID THE JURY RENDER A VERDICT ON THE TARGET, PREDICATE OFFENSE

California law requires in an attempted murder charge the specific intent to kill. People v. Lee (2003) 74 P. 3d 176. [7]. The California Supreme Court does not disagree, " a person guilty of attempted murder as an aider and abettor must intend to kill " People vs. Lee (2003) 74 P. 3d 176 . People vs. McCoy, 25 Cal. 4th 1111 (California Supreme Court, 2001) limits the aider and abbettor's liability to the aider and abettor's own mens rea.. " This court looks to the

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7. This is the decision relied upon by the Ninth Circuit in its denial of the Certificate of Appealability.

California law for the elements of a charge of attempted murder based on aiding and abetting theory Solis vs. Garcia 219 F 3d 922, 927 (9th Cir 2000).[8]

" In this case, the prosecution selected the following target offenses as target crimes (1) discharging a firearm from a vehicle (California Penal Code § 12034 (d) and (2) permitting the discharge of a firearm from a motor vehicle (California Penal Code § 12034 (b). CT 193 - 194 " Report and Recommendation of the Magistrate, Page 18. The " **TARGET CRIME** " is a necessary predicate, precondition, requirement, to a conviction of the ultimate offense which the defendant aided and abetted. The prosecution sought to convict the defendants of attempted murder and employed the devise of using a relatively minor charge, (1) discharging a firearm from a vehicle (California Penal Code § 12034 (d) and (2) permitting the discharge of a firearm from a motor vehicle (California Penal Code § 12034 (b). as the target offense. The prosecution then virtually abandoned the target offenses charged and having used the minor target offenses as a platform for the attempted murder charges ignored them.

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[8]Report and Recommendation of Magistrate page 16

The jury, having failed to return a verdict on the target offenses, found that the target offenses were not committed. It is impossible to have a person aid and abet a crime that was not committed. You cannot aid and abet a crime that did not happen.

INTENT **TO KILL** is an essential element of the crime of attempted murder. California law requires in an attempted murder charge the specific intent to kill. People v. Lee (2003) 74 P. 3d 176. The intent of the unknown perpetrator was never established. The only evidence adduced at the trial was that the perpetrator (passenger in the rear right seat of the vehicle behind the petitioner) fired several shots from the right rear seat of the vehicle at a group in the school yard. In California the mere act of shooting does not establish **intent to kill.** "As we previously observed in the context of evidence of defendant's attempted murder conviction, however, the fact that the defendant shot his victims at close range though strongly indicative was not conclusive of an intent to kill but may have merely demonstrated an intent to disable " People vs. Ratliff, 1986, 41 Cal. 3d at 717; citing as authority People vs. Hayes,

1985, 38 Cal. 2d 7980, 787 - 788, and to the same effect People vs. Woods (1991) 228 Cal App. 3d 1037, 1048 [citing Ratlliff as authority] The jury was not instructed that the mere firing of a weapon from a vehicle does not establish conclusively an intent to kill.

The prosecution must prove all of the elements of a criminal offense beyond a reasonable doubt Estelle vs McGuire, 502 U S 62, 69; 112 S CT 475, 480, 116 L Ed 2d 385 (1995) In Re Winship, 397 US 358, 90 S CT 1068; 26 L Ed 2d 2S 368 (1970); Herrera vs , 506 U S 390 398, 113 S CT 853, 859, 122 L Ed. 2d 203 (1993) Sullivan vs. Louisana 508 U S 275, 277 - 278, 113 S CT 2078, 2080, 124 L Ed 2d 182 (1993)

In Clark vs. Rose, 611 Fed Supp 294 (D. C. Tenn, 1983) the District Court granted a Writ of habeas corpus after examining the question of the mens rea of the defendant[9]

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9. The matter was before the United States Supreme Court in Rose vs. Clark 478 U. S. 570 (1986) which accepted the Court of Appeals finding that the instructions in that case were unconstitutional and limited consideration to the harmless error analysis

" the mens rea element of a crime cannot be presumed from defendant's acts; such a presumption forces defendant to assume burden of disproving an essential element of the crime "

Lockett vs. Arm 728 F 2d 266,272 (6th Circuit 1984)

citing as authority

Engle vs. Koehler, 707 F ed 241 (6th C 1983) affirmedby equally divided Court____U S ____ 104 S. Ct 167380 L. Ed. 1

" What the state may not do is presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant. "

Krzeminski vs. Perini` 614 F 2d 124

In Rose vs. Clark the jury was permitted to find malice from the fact that a killing had occurred. The Circuit Court found that this was unconstitutional. In principle there is no difference in petitioner's case where the jury was permitted to find mens rea, intent to kill, from the fact that

shots had been fired. Consider the comments in the dissenting opinion of Justice Blackmun.

" It is true that when a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. But that truism is beside the point here, where the only facts was that a killing has occurred. The jury was instructed to presume criminal intent, the sine qua non of criminal responsibility from the fact of a dead body. The jury may have found the fact that there was a body, but this jury has not met In Re Winship's requirement of finding, beyond a reasonable doubt, " every fact necessary to constitute the crime " 397 U. S. 364; this jury may never have found that Clark acted with malice, an essential element of the crime of which he was convicted "

Clark vs. Rose 478 U. S. 570, 595

The similarity of the facts are clearly apposite. The only difference is that in Rose criminality was presumed by the presence of a dead body where in petitioner's case the mens rea was presumed by the fact that shots were fired. from the vehicle.

The instructions given to the jury were constitutionally flawed. The instruction regarding natural and probable consequences is set forth at length in the Report and Recommendation of the Magistrate Page 20, footnote 6. wherein lies the violation of the petitioners rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. The jury was permitted to find that the attempted murder could be established by finding that

> " Number one, the crime of driving and permitting shooting from a motor vehicle or shooting a firearm from a motor vehicle.was committed. "

This permitted the jury to find from the fact that a weapon had been fired from a vehicle that the crime of attempted murder was the natural and probable consequences of such act. To paraphrase Mr. Justice Blackmun The jury may have found the fact that there was the firing of a weapon from a vehicle, but this jury has not met In Re Winship's requirement of finding, beyond a reasonable doubt, " every fact necessary to constitute the crime " 397 U. S. 364; this jury may never have found that petitioner acted with intent, an essential element of the crime of which he was convicted.

The pleading mechanism of charging a minor offense as a platform to convict an individual of a very serious offense is constitutionally flawed, particularly where the prosecution uses the target offense merely as a mechanism to convict on the serious offense then abandons the charge. The matter is exacerbated by the fact that the predicate, target, offense of which the petitioner was charged was not found to be proved. The petitioner was not guilty of the target offense. He cannot be held accountable for an offense that was not found to have been committed. The concept of aiding and abetting plus the natural and probable consequences gives the prosecution the means to unjustly convict defendants. The use of the aider and abettor plus natural and probable consequences doctrine must be circumscribed and may not be permitted as a tool of the prosecution to charge, not prove, a minor offense in order to convict of a far more serious offense allows for an abuse of the system and the wrongful conviction of defendants.

The prosecution failed to establish the mens rea of either the shooter or the passenger, petitioner, and the conviction should be reversed.

4 B

SECOND GROUNDS
PETITIONER IS ENTITLED TO CERTIFICATE OF APPEALABILITY

People vs. Lee is not Determinative

The Ninth Circuit, relying on the conclusion reached in Lee denied COA. The reliance on Lee to foreclose any examination of the issues in the petitioner's case is misplaced. In Lee the Supreme Court of California cited as authority and with approval that a person guilty of attempted murder as an aider and abetter must intend to kill " People vs. Lee (2003) 74 P. 3d 176; People vs. McCoy, 25 Cal. 4th 1111 (California Supreme Court, 2001) limits the aider and abbettor's liability to the aider and abettor's own mens rea.

The California Supreme Court in Lee did not address the constitutional issues, giving only a brief mention in the opinion. The California Supreme Court limited its discussion to the application of Penal Code § 664 (a) which increases the punishment for the offense of attempted murder. For the purposes of an increase in the penalty Penal Code § 664 (a) does not require that the jury be instructed with regard to the

mens rea of an aider and abettor for the purpose of imposing the additional penalty. Clearly this is the finding of the California Supreme Court in Lee. You cannot reconcile the California Supreme Court reference, in the opinion as follows: " which means that the person guilty of attempted murder as an aider and abettor must intend to kill (See People vs. McCoy, supra 25 Cal. 4th at. 1118, 108 Cal. Rptr. 2d 188, 24 :. 3d 1210 " with any other rational interpretation. The California Supreme Court did not find that mens rea of the aider and abettor is not an element of the crime of attempted murder.

Standard for Granting

Standards for the granting of a Certificate of Appealability are set forth in Barefoot vs. Estella 163 U. S. at 894, 103 S. Ct 3383.

> " In Barefoot, the Court established several ways in which a petitioner can make the " substantial showing of the denal of a constitutional right " To meet this " threshold inquiry." Slack120, S. Ct, the petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could

resolve issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.

Lambright vs. Stewart (9th 2000 ,)

220 F 3d 1022, 1024 - 1025

Any doubts whether a CPC (now COA) should be issued are to be resolved in favor of the Petitioner. " obviously the petitioner need not show that he should prevail on the merits. He had already failed in that endeavor " Lambright vs. Stewart (9th 2000,) 220 F 3d 1022, 1025 citing Barefoot vs. Estella 163 U. S. at 894, 103 S. Ct 3383. And the Seventh Circuit has held that " a COA " should issue unless the claims are " utterly without merit " Jefferson vs. Welborn 222 F 3d 286, 289 (7th 2000) cited in Lambright vs. Stewart (9th 2000,) 220 F 3d 1022, 1025

The constitutional claims of the petitioner have not been previously determined, were not determined in People vs. Lee relied upon by the Ninth Circuit and that the issues are debatable among jurists of reason; that a court could

resolve issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

5.

STANDARD OF REVIEW

The adjudication by the California Courts of the petitioners guilt involves an unreasonable application of clearly established Federal Law as determined by he Supreme Court of the United States and resulted in a decision based on an unreasonable determination of the evidence presented in the California Courts. The federal law, as established by the United States Supreme Court has held that the prosecution must prove every element of a criminal offense and may not shift that burden to the defendant. The prosecution must prove all of the elements of a criminal offense beyond a reasonable doubt Estelle vs McGuire, 502 U S 62, 69; 112 S CT 475, 480, 116 L Ed 2d 385 (1995) In Re Winship, 397 US 358, 90 S CT 1068; 26 L Ed 2d 2S 368 (1970); Herrera vs , 506 U S 390 398, 113 S CT 853, 859, 122 L Ed. 2d 2S 203 (1993) Sullivan vs. Louisana 508 U S 275, 277 - 278, 113 S CT 2078, 2080, 124 L Ed 2d 182 (1993) " What the state may not do is presume that an element of a crime

exists as a result of given conduct and then place the burden of showing otherwise on the defendant. " Krzeminski vs. Perini` 614 F 2d 124

The only proof presented was that an unknown perpetrator fired a weapon from the rear right seat of a vehicle. Nothing more. And the jury did not convict on that charge. In effect the prosecution relied upon the firing of the weapon for proof of all of the elements of attempted murder. The shifting of the burden of proof to the defendant has long been held unconstitutional any instruction to the jury to the contrary notwithstanding. The matter is properly the subject of federal corpus relief.and a certificate of appealability should have issued. The matter can be properly resolved by the grant of certiorari and return of the matter to the Court of Appeals for the Ninth Circuit

6.

PRAYER FOR RELIEF

The petitioner, whose only transgression was that he was a passenger in q vehicle is now serving four consecutive life terms. In the specific intent crime of attempted murder the charging of a minor target offense and then relying on the

aiding and abetting and natural and probable consequences doctrine permitted the constitutionally impermissible shifting of the burden of proof of mens rea. This is contrary to well established constitutional procedures established by this Court many years ago. The writ should issue and there should be a full consideration of the issues.

Respectfully submitted

JOHN DE HART

APPENDIX

REPORT RECOMMENDATION OF U.S. MAGISTRATE ... ITEM 1

ORDER DENYING CERTIFICATE OF APPEALABILITY .. ITEM 2

ORDER ACCEPTING AND ADOPTING REPORT AND ..... ITEM 3
RECOMMENDATION OF U.S. MAGISTRATE AND
DENYING PETITION FOR WRIT OF HABEUS CORPUS

JUDGMENT ..... ITEM 4

PETITION FOR WRIT OF HABEUS CORPUS ..... ITEM 5
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ORDER DENYING CERTIFCATE OF APPEALABILITY .... ITEM 10

ORDER RE: STATUS OF PETITION .....ITEM 11

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TRAVERSE

ITEM 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FREDERICK HYES, JR.,	),	No. EDCV 98-0052-RT
	)	(MAN)
Petitioner.	)	
	)	REPORT AND
vs.	)	RECOMMENDTION
	)	OF UNITED STATES
LARRY SMALL, Warden,	)	MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	
	)	

This Report and Recommendation is submitted to the Honorble Robert J. Timlin, United States District Judge, pursuant to 28 U. S C. § 636 and General Order No. 01-13 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, a California state prisoner, filed a petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254

("Petition "). Respondent filed a Return and petitioner filed a Traverse. The matter is deemed submitted and is ready for decision.

PRIOR PROCEEDINGS

On April 6, 1995, a Riverside County jury found petitioner and his co-defendnt, Ventrice Laster (" Laster ") guilty of four counts of attempted murder arising out of a drive by shooting. The jury found that the attempted murders were premeditated and that they were " hate crimes " within the meaning of Caliornia Penal Code § 422.75, the California hate crime statute. The jury also found that Laster participated as a principal, knowing that another principal was armed with a firearm. (Clerk's Transcript (" CT ") 351-381) The jurors were unable to reach a verdict on the allegations that petitioner personally used a firearm, in violation of California Penal Code § 12022.5 (A), and that petitioner inflicted great bodily injury upon each victim, in violation of California penal Code § 12022.7 (CT 368). The trial court sentenced petitioner to four consecutive terms of

life with the possibility of parole, plus 12 years for the enhancements[1] (CT 432).

Petitioner appealed. (Petition at 2) On February 26, 1997, the California Court of Appeal affirmed petitioner's conviction and sentence in a partially published opinion. (Respondent's April 23, 1998, Notice of Lodgment (" Lodgment ") No. 3 partially published as People vs. Laster, 52 Cal. App. 4th, 1450, 61 Cal. Rptr. 2d 680 (1997)[2]. Petitioner filed a petition or review before the California Supreme Court (Lodgment No. 4) On June 18, 1998, the California Supreme Court denied the petition or review and petitioner's request for depublication of the Court of Appeal opinion (Lodgment No. 6).

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1. The trial court sentenced Laster to four consecutive terms of life with the possibility of parole, plus 20 years for the enhancements (CT 410-412, 420).

2The Court will cite to the published Laster opinion when referring to those portions of the decision that were published. The Court will cite to Lodgment No. 3 when referring to the unpublished portions of the California Court of Appeal's decision.

On January 24, 1996, and February 5, 1996, before the California Court of Appeal issued its opinion in petitioner's direct appeal petitioner filed two petition or writ of habeas corpus with the California Supreme Court. (Lodgment Nos 7 and 9) The California Supreme Court denied both petitions by separate orders dated March 27, 1996 (Lodgment Nos. 8 and 10)

SUMMARY OF THE EVIDENCE AT TRIAL

The following summary of the evidence at trial is based on the California Court of Appeal's findings regard the facts underlying petitioner's conviction.[3]

On July 5, 1994, at about 3:00 p. m., Venus Blankenship; stopped at an ARCO station on University Avenue in Riverside to get gas. She was accompanied by her cousin Nominick Hayes and her two children. Venus, with her

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[3] As discussed infra, the California Court of Appeal's determination of factual issues is presumed to be correct, absent clear and convincing evidence rebutting that presumption 28 U. S. C § 2254 (e) (1).

children, went inside to pay; Nominick got out to pump the gas. There were four Hispanic males in a nearby car. One of them got out and asked Nominick whether he was a member of the 1200 Block Crips, and he denied it. A second Hispanic male came up, asked Nominick where he was from, and announced, " this is tiny dukes ". a third Hispanic male rode into the gas station on a bicycle and asked Nominick what he had said to his " homeboy. " Venus, who had been standing at the store entrance watching the confrontation, said, I don't think he said anything We will just leave ".

At that point, the third man hit Nominick on the back of the head with 40 ounce beer bottle. Nominick started running. The first man threw a bottle at Nominick which hit him in the leg. All three men starting chasing him. Nominick ran to a construction site, where one of the workers called police.

Meanwhile, Venus drove to the courthouse, where she called her mother. She said some gang members had hit Nominick in the head with a bottle, and he had run off. She " may have " said they were Mexicans. Venus also called the police.

they told her Nominick was on he other phone, and gave her directions to the construction site. she drove back to look for Nominick, but couldn't find him At about 5:30 p. m., she went to her mother's house.

Venus's mother Francetta Hayes, lived on Hemlock Street in Moreno Valley, with Venus's sisters, Cherie Mays and Darlena Mays. Laster was Cherie's fiancee. Petitioner was Venus's cousin and was staying at the house while visiting from Detroit.

At around 5:00 or 6:00 p.m., before Venus got home Cherie let petitioner and Laster take her maroon car to look for Nominick. Around 5:30 or 6:00 p.m., they returned to the house. Two other people were with them. Venus's mother went out to the car and talked to petitioner and Laster. petitioner and Laster left for about ten minutes, then came back alone.

Virginia Duenas was at Sixth and Franklin, along the east side of Longfellow Elementary School, in Riverside. She heard

screeching tires; then she saw Cherie's maroon car. It was swerving and turning " crazy like ". There were three or four black males in the car. Duenas took down the license plate number.

At about 6:55 p. m., the maroon car was on Eucalyptus venue, along the west side of Longfellow Elementary School, next to the basketball courts. There were about 30 people in the basketball area. One was black; the rest were Hispanic. Two of them were dressed like " gang bangers " with " saggy pants " Ten of them were children.

The basketball area was surrounded by a fence, and a gate in the fence opened directly onto a crosswalk at Seventh and Euclyptus. There was a stop sign on the south side of the crosswalk. The maroon car stopped in the middle of the crosswalk. Witnesses saw four black men inside the car. One of the men fired about 20 shots, in two bursts, through the gate and into the basketball area.

According to Richard Guzman, who was playing basketball, the shots came from the front passenger window; he could see the flashes. Seven year old Albert Gonzales also testified that the shot were fired from the font passener window.

The gunfire struck four people. Two year old Anna Gonzales, Albert's sister, was hit in the head. Joseph Romero was shot in the abdomen Arturo Marquez was shot in the back, and Augustine Crervantes Sanchez was shot in the leg.

At about 7:30 or 8:00 p. m., Nominick called the house on Hemlock. He said he was at Laster's mother's house. Petitioner and Laster took Venus's car and went to pick him up.

Police traced the license number Virginia Duenas had taken down to the house on Hemlock. Around 10:00 p. m., Riverside Police Detective Ron Sanfilippo and other officers went there. The maroon car was outside. At about the same time, petitioner and Nominick walked up. The police

questioned them briefly. Hayes denied having gone to Riverside.

Sanfilippo went in and told Cherie her car had been used in a shooting in Riverside that day. She told him that, around 5:30 p.m., she had lent the car to " Vince and Fred ". At first, she claimed she didn't know their last names, but later admitted that " Vince " was Laster and that he was her boyfriend. Sanfilippo also interviewed Venus, who told him about the attack on Nominick. Venus told him that, after the attack, she spoke to petitioner on the phone and told him some Mexican males had hit Nominick over the head with a bottle at a gas station

Sanfilippo took petitioner and Laster back to the station. They waived their Miranda rights and agreed to be interviewed.

Petitioner said he had been out to Lake Perris with some friends. When he returned, be heard that some Mexicans had attacked Nominick in Riverside. He and Laster then took

Cherie's car to go to Riverside. Laster was driving; petitioner was in the front passenger seat. On the way, they stopped at a grocery store and picked up two other black males. They were introduced to Hayes as " homie or home boy or something ". Petitioner though Laster knew them. but was not sure if he knew their names. Petitioner gave Sanfilippo a description of them. The two men got into the back set. They all then went to Riverside to look for Nominick.

Petitioner admitted that before they got to Riverside, he knew there was a gun in the car. At first he said they went somewhere to get a gun; then he changed his sorry and said that one of the two men got into the car with a gun.

They ended up by Longfellow Elementary School Petitioner saw Mexicans standing around on the school grounds. The car stopped in he middle of the crosswalk, and one of the men in the back began shooting. Petitioner was taken by surprise. he claimed he did not know what happened afterward to the two men or to the gun.

Petitioner explained that he lied at first, because " I was in the car and I know I was in the car " Sanfilippo admitted that petitioner " was pretty upset that a two year old girl got shot " Petitioner told him, " I know what I did. I messed up. God is, you know, real, and I messed up. "

When Laster was first interviewed, he denied everything. After the officers had spoken to Nominick, however, they re-interviewed Laster. This time, he admitted that he was driving the maroon car; petitioner was in the front passenger seat. They had gone to 'Riverside to look for Nominick. They had picked up two other black males, one in Moreno Valley and one in Riverside. Laster indicated that he knew who they were, but he wasn't going to give up their names. He referred to one as a " friend I know for a long time ". He said one was nicknamed " Skee "; he claimed he did not know the other one's name. The two men rode in the back seat. One of them did the shooting. Afterwards, Laster dropped the two men off. Laster claimed he didn't know what happened to the gun.

Police found nineteen .22 caliber shell casings scattered around the rear seat of the maroon car. A criminalist testified that they were probably fired from a semiautomatic weapon that ejected sells to the right and backward. There were no usable fingerprints on the shell casings.

Both petitioner and Laster testified at trial. Petitioner testified that he and Laster spent the afternoon at lake Perris with some friends. At about 5:30 p.m., they got back to the house on Hemlock. There he heard that some Mexicans had hit Nominick in the head with a bottle at an ARCO Station in Riverside, and no one knew here he was.

At about 5:40 p. m., Laster and petitioner took Cherie's car to go look for Nominick. Laster was driving; petitioner was in the front passenger set. First, they went to a area of apartment buildings and grocery stores in Moreno Valley. Laster got out of the car and went out of petitioner's sight. three to five minutes later, he came back with " two gentlemen " who got into the back seat of the car. petitioner

didn't know them; they weren't introduced to him One of them had a long black gun stuck in his pants.

They drove to Riverside, then drove around looking for Nominick for about ten minutes. Nobody in the car said anything. As they neared the crosswalk at the school, someone in the back seat said, " Stop ". Laster stopped the car at the stop sign. The men in the back seat were talking among themselves. Petitioner admitted telling the police that someone in the car said " There's the Mexicans. There's those eses "[4] They're the ones that got your cousin " At trial, however, he could only remember that they said " something about eses ". At that point, the man behind petitioner began firing out the back window. Petitioner ducked, then turned around and saw the man firing. Laster drove away; as he did, the man was still firing. Laster said " You guys shouldn't have done that ".

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4. Detective Hector Heredia testified that " ese " was a street term used to greet a , Hispanic person.

They drove to the house on Hemlock. Petitioner got out, and Laster and the two men left. Laster, Laster returned home alone. Petitioner didn't tell anyone in the house what had happened.

Laster testified that, when he and Hayes got home from Lake Perris Francetta Hayes told him that Nominick had been hit in the back of the head with a bottle by " some guys " at an ARCO station in Riverside. No one told him they were Hispanic of that they had accused Nominick of being a gang member.

Petitioner and Laster took Cherie's car to go looking for Nominick along with two other men whom petitioner described as " some friends of mine that I've known for about three to four hours out of my whole life " Laster had met them the day before, at a shopping center. he explained that he took the men along because " I was afraid....of going there with just me and Frederick Hayes ". He picked them up at the shopping center. Laster later admitted telling Sanfilippo

that he had picked one of them up in 'Riverside, but he claimed that was a lie. He never saw that they had a gun

They drove around Riverside looking for Nominick. There was no discussion in the car. At the school, Laster made a legal stop at the stop sign. He denied that anyone told him to stop. he also denied hearing the men in the back talking about " eses ". Then he heard shots. At first, he did not know where they were coming from. He looked all around, when he looked behind him, he saw " the guy in the right rear shooting ". He yelled " What the fuck are you doing " Laster then took off. Nobody in he car spoke. He went straight back to Hemlock, dropped petitioner off, then took the two men back to where had picked hem up and returned to Hemlock

(Laster, 61 Cal. App. 4th at 1456-61)

PETITIONER'S CONTENTIONS

Although couched as two claims, petitioner's claims re, in effect, a single claim that his due process rights were violated

because (1) the jury as allowed to find petitioner guilty of attempted murder as an aider and abettor without finding intent on the part of the perpetrator of the crime; and (2) the jury was not instructed that it must determine, beyond a reasonable doubt, all of the elements of the ultimate offense in order to find petitioner guilty as an aider and abettor (Petition at 3; Points and Authorities in Support of petition (" P & A ") at 4 - 11)

STANDARD OF REVIEW

This action is subject to the amendments to the federal habeas corpus statutes contained in the Antiterrorism and Effective Death Penalty Act, effective April 24, 1996 (" AEDPA "). See Lindh v. Murphy 521 U. S. 320, 326, 117 S. Ct. 2059, 2063 (1997)

A. The ADEPA Requirements

Federal habeas relief is available only to state prisoners who are " in custody in violation of the Constitution or laws or treaties of the United States " 28 U. S. C. §§ 2241, 2254' see

also Estelle v. McGuire, 502 U. S. 62, 68, 112 S. Ct. 475, 480 (1991) However, the AEDPA " modified a federal habeas court';s role in reviewing state prisoner applications in order to prevent federal habeas " retrials " and to ensure that state-court convictions are given effect to the extent possible. under state law " Bell vs. 'Cone, ____U.S. _____122 S. Ct 1843, 1849 (2002). Under the ADEPA, the writ " shall not be granted " based on a claim asserting federal error unless the state court's adjudication of the claim on the merits;

> (1) resulted in decision that was contrary to, or involved and unreasonable application of, clearly established ederal law, as determined by the Supreme Court of the United States;

or

> (2) resulted in a decision that was based on an `unreasonable determination of the evidence presented in the State court proceeding.

28 U. S. C. § 2254 (d). See also Williams vs. Taylor 529 U. S. 362, 405-411, 120 S/ Ct 1495, 1519 - 22 (2000) in which the Supreme Court explained the " new constraints " imposed by Section 2254 (d) (1), as amended by the AEDPA, As the Supreme Court determined.

> Under the " contrary to " clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law of if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the " unreasonable application " clause a federal habeas court may grant the writ only if the state court identifies the correct governing principle from this Court's decision but unreasonably applies `that principle to the facts of the prisoner's case.

Id at 412-413, 220 S.Ct at 1523. See also Bell, 122 S. Ct at 1850, Weighall vs. Middle, 215 F. 3d 1058, 1061-62 (9th Cir 2000)

In conducting the " unreasonable application " inquiry, this Court must determine " whether the state court's application clearly established federal law was objectively unreasonable " Williams 529 U. S at 409, 120 S. CT. at 1521; .. Weighall 215 F 3d at 1062. The Supreme Court has made clear that a state court's incorrect application of federal law, does not, on its own, warrant habeas relief under the AEDPA, explaining that " a federal court may not issue the writ simply because that court conclude in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable " Williams 529 U. S. at 410-11, 120 S. Ct. at 1522; See also Bell, 122 S. Ct. at 1850 (" an unreasonable application is different from an incorrect one ")

Following Williams the Ninth Circuit has interpreted the " unreasonable applications " prong of Section 2254 (d) to mean that, before habeas relief can be granted, a federal court must find that a state court's application of clearly established federal law was ' unreasonable " because it was "

clearly erroneous " see, e. g., Baker v. City of Blaine, 221 F 3d 1108, 1110, n. 3 (9th Cir 2000) Weighall 215 F. 3d at 1062; Trn v. Lindsay, 212 F. 3d 1143, 1152-54 (9th Cir 2000), cert denied, 531 U. S. 944, 121 S. Ct. 340 (2000)

Under both prongs of Section 2254 (d) (1), the holdings of the Supreme Court constitute the relevant " clearly established Federal law " In Williams, The Supreme Court made clear that " § 2254 (d) (1) restricts the souce of clearly established law to this Court's jurisprudence " as of the time of the relevant state-court's decision " 529 U. S. at 412, 120 S. Ct at 1523. See also Tran 212 F. 3d at 1154 (" the only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court "). However, Ninth Circuit caselaw still " may be persuasive authority for the purpose of determining whether particular state court decision is an ' unreasonable application ' of Supreme Court law, and also may help ...determine what law is clearly established " Id (citation omitted).

Additionally, under Section 2254 (d) (1), if a petitioner's claim is subject to " harmless error " analysis then even if a state court's ruling is erroneous under either the " contrary to " or " unreasonable application " prong, habeas relief is available only if the federal law violation had a " substantial and injurious effect or influence in determining the jury's verdict " Brecht v. Abrahamson, 507 U. SD. 619, 637, 113 S. Ct 1710, 1722 (1993) (citation omitted). See Benn v. Lambert, 283 F. 3d 1040, 1052 n 6 (9th Cir 2002) (noting that the erroneous state court ruling must satisfy Brecht before habeas relief may be granted) petition for cert filed, 70 U. S. L. W 3643 (US May 28, 2002) (No. 01 - 1755) (9th Cir. 2001)

Finally, in reviewing the habeas petition " [a] federal court must presume the correctness of the state court's factual findings " Bains v. Cambra, 204 F 3d 964, 972 (9th Cir.) cert. denied, 531 U. S. 1037, 121 S. Ct. 627 (2000); see also Zichko v. Idaho 247 F 3d 1015, 1019(9th Cir 2001) The petitioner bears the burden of rebutting that presumption by clear and convincing evidence. 28 U. □. C § 2254 (e) (1)

B Application of The AEDPA To The Present Proceedings.

Petitioner raised the claim alleged in the instant Petition on direct appeal (Petition at 2; Lodgment No. 4). The California Court of Appeal reached the merits of the claim when it issued a written reasoned decision on the merits, partially published, regarding the constitutional violations asserted (lodgment no. 3) the California Supreme Court reached the merits of the claim when it denied petitioner's petition for review without comment or citation to authority (see Hunter vs. Aispuro 982 F. 2d 344, 348 (9th Cir. 1992). To determine the reasonableness of the California Supreme Court's decision, this Court must analyze the written opinion of the California Court of Appeal. See Y1st v. Nunnemaker, 501 U. S. 797, 803, 111 S. Ct. 2590, 2594 (1991) (" where there has been one reasoned state court judgment rejecting federal claim, later unexplained orders upholding that judgment or rejecting that same claim rest upon the same ground ") Shackleford v. Hubbad, 234 F. 3d 1072, 1079 n. 2 (9th Cir. 2000) (looking through California Supreme Court's silent denial of review to assess unpublished

California Court of Appeal opinion) Thus, in conducting habeas review of Petitioner's claim, this Court must apply the differential standards or review articulated in 28 U. S. C. § 2254 (d)

DISCUSSION

Petitioner's two claims in this petition are essentially aspects of a single contention, namely, that the jury was allowed to find petitioner guilty upon an aiding and abetting theory without finding, beyond reasonable doubt, the unidentified perpetrator's mens rea. (Petition at 3; P. & A. 4 - 11) Petitioner contends that the jury instructions thereby effectively relieved the prosecution of it's burden under the Due process Clause, of proving an element of the charged chimes, i. e., the intent of the actual perpetrator (P & A at 4 - ,11)

The Due Process Clause protects an accused from conviction unless the prosecution proves, beyond a reasonable doubt, every element of the charged offense. In Re Winship, 397 U. S. 358, 364, 90 S. Ct. 1068, 1072 - 1073 (1970). Jury instructions relieving the prosecution of this

burden violate the accused's due process rights Carella v California 491 U. S. 263, 265, 109 S. Ct 2419, 2420 (1989); Sandstrom v. Montna, 442 U. S. 510, 521 - 24, 99 S. Ct 1450m 2458-59 (1979); see Keating v. Hood 191 F. 3d 1053, 1061 (9th Cir 1999) (" Interactions that allow jury to convict without finding every element of the offense violate In Re Winship's requirement that " every fact necessary to constitute the crime must be proven beyond a reasonable doubt "). cert denied, 531 U. S. 824, 121 S, CT.. Ct. 69 (2000), abrogated on other grounds by Mancuso v. Olivarez, 292 F. 3d 939, 944 n. 1 (9th Cir. 2002)

This Court looks to California law for the elements of a charge of attempted murder based on aiding and abetting theory Solis v. Garcia, 219 F. 3d 922, 927 (9th Cir. 2000), cert denied ___U. S., 122 S. Ct. 94 (2001) Under California law, a person who aids and abets the commission of a crime is a " principal " in the crime and shares the guilt of the actual perpetrator. People vs. Prettyman 14 Cal. 4th 248, 259, 58 Cal. Rptr. 2d 827, 832 (1996). An aider and abettor is person who acting with (1) knowledge of the unlawful

purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. Id at 259, 58 Cal. Rptr. 2d at 832-33' People vs. Beeman, 35 Cal. 3d 547, 561, 199 Cal. Rptr. 60, 69 (1984)

An aider and abettor is guilty not only of the offense he intended to facilitate or encourage but also of any reasonably foreseeable offense committed by the person he aids and abets. Prettyman, 14 Cal. 4th at 261, 58 Cal. Rptr. 2d at 834. Thus, a defendant may be held criminally responsible not only for the crime he intended to aid and abet (the target crime) but also for another crime that was the " natural and probable consequence " of the target crime Id. ; People vs. Croy 41 Cal. 3d 1, 12, n. 5, 221 Cal. Rptr. 592, 596 n. 5 (1985) To apply the " natural and probable consequences " doctrine, the jury must decide: (1) whether the defendant, (I) with knowledge of his confederate's unlawful purpose, and (ii) the intent of committing, encouraging or facilitating the commission of the target chimes, (iii) aided, encouraged or instigated the commission of the target crimes; (2)

whether the defendant's confederate committed an offense other than the target crimes; and (3) whether the offense committed by the confederate was natural and probable consequence of the target crimes that the defendant encouraged or facilitated Prettyman 14 Cal. 4 th at 267, 58 Cal. Rptr. 2d at 838. Laster 52 Cal. App 4th at 1463, 61 Cal. Rptr. 2d at 688

In this case, the prosecution selected the following offenses as target crimes: (1) discharging a firearm from vehicle (California Penal Code § 12034 (d); and (2) permitting the discharge of a firearm from a motor vehicle (California Penal Code § 12034 (b). (CT 193-94). The prosecution took the position that petitioner and Laster had knowingly and intentionally aided and abetted the commission of one or the other, or both, of these target crimes; that it was reasonable foreseeable that, as a consequence of the target crimes, the perpetrator would commit attempted murder; and that petitioner and Hayes were, therefore guilty of attempted

murder[5] Laster 52 Cal App 4th at 1463, 61 Cal Rptr 2d at 688.

Thus, in order to find petitioner guilty of premeditated attempted murder as an aider and abetter, the jury was required to find that he: (1) with knowledge of the perpetrator's unlawful purpose, and (2) with the intent of encouraging or facilitating the commission of the target crimes of discharging or permitting the discharge of a firearm from vehicle (3) aided, encouraged or instigated the commission of the target crimes of discharging or permitting the discharge of a firearm from a vehicle. Prettyman, 14 Cal. 4th at 267, 58 Cal. Rptr. 2d at 838. The jury was, in addition, required to find that: (1) the perpetrator committed premeditated attempted murder; and (2) attempted murder was a natural and probable consequence of the target crimes (discharging

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5. As to petitioner, the prosecution took the position that he had either shot the victims himself (i. e., he was the perpetrator) or that he was the aider and abettor under the theory described above. As noted above, the jury was unable to reach verdict on the allegations that petitioner had inflicted great bodily injury and had personally used firearm (CT 368). It must be assumed, therefore, that the jury dd not find petitioner to have been the perpetrator and that its guilty verdict was based on an aiding and abetting theory.

or permitting the discharge of a firearm from a vehicle) that petitioner encouraged or facilitated.

Petitioner contends that his conviction cannot stand because the jury was not instructed that it had to find, beyond a reasonable doubt, that the perpetrator had the necessary intent for a finding that he committed premeditated attempted murder. (p & a at 8) the California Court of Appeal found otherwise:

> { The] instructions made it clear that defendants could be found guilty of a crime by the perpetrator only if the prosecution proved beyond reasonable doubt that the perpetrator's crime was a natural and probable consequence of the target offense. They also made it clear that the prosecution has to prove beyond a reasonable doubt that the perpetrator had intent to kill; and that the perpetrator premeditated and deliberated. "

(Lodgment No. 3 at 37-38; emphasis added)

A review of the record supports the state court's conclusion. The jury was instructed with CALJIC 2.90 regarding the prosecution's burden prove the charges beyond a reasonable doubt (CT 189; Reporter's Transcript (" RT ") 487-88). It was instructed with CALJIC 3.01 regarding the elements of aiding and abetting. (CT 191; RT 488-489). It was instructed with CALJIC 3.02 regarding the " natural and probable consequences " doctrine; that instruction specifies, among other things, that " a co-principal in such crime committed the crime of attempt [ed} murder[6]. it was

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6. The " natural and probable consequences " instruction read, in pertinent part:

> one who aids and abets the commission of a crime..... is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.
>
> In order to find the defendant guilty of the crime of attempt [ed} murder as charged in Counts I, II, III and IV, you must be satisfied beyond reasonable doubtthat,
>
> Number one, the crime of driving and permitting `shooting from a ,motor vehicle or shooting a firearm from a motor vehicle was committed.

instructed with CALJIC 8.67 regarding the elements of

> Number two, that the defendant aided and abetted such crime or crimes.
>
> Number three, that a co-principal in such crime committed the crime of attempt { ed } murder.
>
> Number 4, the crime of attempt [ed } murder was a naturaland probable consequence of the commission of the crime of driving and permitting shooting from a motor vehicle or shooting a firearm from a motor vehicle

(RT 489; emphasis added)

> The instruction on attempted murder read, in pertinent part:
>
> Murder is the unlawful killing of a human being with malice aforethought
>
> In order to prove such a crime, each of the following elements must be provided
>
> Number one, a direct but ineffectual act done by one person towards killing another human being, and
>
> Number two, the person committing such act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being.

(RT 493 - 494; emphasis added)

premeditated attempted murder [7] (CT 206-07, RT 494-95) and it returned a special verdicts finding the attempted

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7. The instruction on premeditated attempted murder read, in pertinent prt:

It is also alleged in Counts I< II III and IV of the information

that the crime attempted was willful, deliberate and premeditated murder. If you find the defendant guiltyof attempt to commit murder, you must determinewhether this allegation is true or not true.

" Willful " means intentional " Deliberate " means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.
" Premeditated " means considered beforehand.

If you find that the attempt to commit murder was preceded and accompanied by a clear, deliberate intent to kill, vehicle was the result of deliberation and premeditation, so that it must have been formed uponpre-existing reflection and not under sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate, and premeditated murder.

The law does not undertake to measuring units of time the length of the period during which the thought to kill must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different in individuals and under varying circumstances.

murder to be premeditated as to all four victims (CT 371, 374, 377, 380) It was also instructed, pursuant to CALJIC 3.31 that, s to the charged crimes " there must exist a union or joint operation of act or conduct and a ~~certain~~ specific intent and/or mental state in the mind of the perpetrator " and that " unless such specific intent and/or mental state exists the crime or allegations to which it related is not committed (CT 202; RT 492-93)

> The true test is not the duration of time,. but, rather the extent of reflection. A cold, calculated judgment and decision may be arrived in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation.
>
> To constitute willful, deliberate and premeditated attempted murder, the would be slayer must weigh and consider the question of killing and the reasons for and against such a choice, and, having in mind the consequences, decides to kill, and ma,es a direct but ineffectual act to kill another human being.
>
> The people have the burden or proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not rule.

Thus the record belies petitioner's contention that the jury did not have to find the perpetrator's mens rea in order to find petitioner guilty. The instruction did not permit the jury to find petitioner guilty of attempted murder until it had first determined that a co-principal had committed the crime of attempted murder. (RT 489-90) To make such a finding, the jury had to find that the perpetrator harbored a specific intent to kill (RT 493-94) To find petitioner guilty of premeditated attempted murder, the jury had to first find premeditation on the part of the perpetrator (RT 494-95) It is simply not true that, as petitioner contends, no instruction was given to the jury on the intent of the perpetrator in the event that the jury did not find that petitioner was himself the perpetrator. (P & A at 10). The aiding and abetting instructions only applied to petitioner in the event the jury did not find, (as it apparently did not) that he was the shooter. As shown above, those instructions clearly required the jury to find the elements of attempted murder by the perpetrator, including his specific intent.

Petitioner argues that these instructions existed " in a complete vacuum " because the perpetrator whose intent had to be proved was never identified (Traverse at 5.) Under both California and federal law, a defendant may be convicted as a principal to aiding and abetting an unidentified perpetrator without running afoul of any constitutional prohibition United States v. Powell 806 F. 2d 1421 (9th Cir. 1986 (" defendant can be convicted as a principal under an aiding and abetting theory even though the actual perpetrator was not specifically identified). the prosecution must, of course, prove that the charged offense has been committed, and that the perpetrator had the requisite intent Powell 806 F2d at 1424; People vs. Patterson, 209 Cal. App. 3d 610, 257 Cal. Rptr. 407 (1989,). Here, as shown above, the jury instructions required the jury to make just such a finding. The jury is presumed to have understood and followed the instructions. See, e.g., United States v. Olano, 507 U. S. 725, 740, 113 S. Ct 1770, 1781 (1993)' Richardson v Marshj, 481 U. S. 200, 211, 107 S. Ct 1702 (

1987). Moreover, for the reasons discussed below, he evidence supported such a jury finding [8]

Petitioner further contends that the jury instructions did not provide adequate guidance to the jury regarding how to go about determining the intent to kill of an unknown and unidentified perpetrator (P & A AT 8-9); Traverse at 4-5) He argues that " [t] he jury should have been given an additional cautionary instruction that the firing of the weapon, by itself, does not establish intent to kill "[9] (Traverse at 5)

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8 Petitioner does not directly attack the sufficiency of the evidence at trial to support a finding that the perpetrator had the requisite intent. Such a claim, if made, would be unexhausted, as petitioner did not pursued sufficiency of the evidence claim in the state courts.

9. Petitioner also notes that the jury was not " given any lesser included offenses instructions concerning the attempted murder charge " (P % A. at 10 n 3) Petitioner does not specify what lesser included offense instructions the trial court should have give nor claim that they wr necessary to his theory of the case. In fact at petitioner's request, the trial court gave instructions on he lesser included offenses of accessory after the fact and assault with a deadly weapon (CT 208-10) In any event the failure of a state trail court to instruct sua sponte on a lesser included offense in a non-capital case, such as this one, does not generally present

A claim of constitutional error does not raise a cognizable federal claim unless the error " so infected the entire trial that the resulting conviction violates due process " Estelle 502 U. S. at 71-72, 112 S. Ct at 481-82; Henderson v. Kibbe 431 U. S. 145, 154. 97 S. Ct. 1730. 1936-37 (1977'); Cupp v. Naughten 414 U. S. 141, 146 -147, 94 S. Ct 396, 400 (1973). In determining whether a constitutional violation has occurred, the claimed instructional error must be viewed in light of the instructions as a whole, as well s the trial record. See Cupp, 414 U. S. at 147, 94 S. Ct. at 400 Where the alleged error is the failure to give an instruction the burden on the petitioner is " especially heavy ". Henderson 431 U. S. at 155, 97 S. Ct. at 1737

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a federal constitutional question and s not cognizable in federal habeas corpus proceeding. Sollis 219m F. 3d at 929 (quoting Bashor v. Risley 730 F. 2d 1228, 1240 (9th Cir. 1984); Windham v Merkle 163 F. 3d 1092, 1106 (9th Ciur. 1998). See lso Beck vs. Alabama, 447 U. S. 625, 638 n. 14, 100 S. Ct 2382, 2390 n. 14 (1980) (expressly reserving judgment on whether the Due process
Clause would require the giving of a lesser included offense instruction in a non-capital case.

Here, the jury instructions defined the meas rea for premeditated attempted murder and required the jury to find that the perpetrator has the requisite mens rea. Petitioner's counsel did not seek additional instructions clarifying the evidence sufficient to support a finding of intent to kill by the perpetrator, and petitioner cites no law requiring the trial court to give such an instruction sua sponte. Furthermore, the jury was not, at petitioner contends, asked to presume intent from no more than " the fact that the weapon was fired " (Traverse at 4.). There was evidence at trial that one of the occupants of the car announced that people at the playground were the " esse " who had attacked petitioner's cousin; that the car stopped by the gate, which afforded unobstructed view of the playground; that the perpetrator aimed at and fired about twenty shots, in two bursts, from a .22 caliber (probably automatic) gun into the basketball courts where about 30 Hispanic people, including children, were paying basketball or tanding around (RT 109-10, 117-18, 237-39, 345, 416.) Under these circumstances, the trial court's failure to give, in addition to the standard CALJIC instructions, additional instructions regarding the

perpetrator's intent, cannot be said to have violated petitioner's due process rights. Estelle 502 U. S. at 71-72, 112 S. Ct at 481-482

To summarize, the jury as properly instructed that it must find, beyond a reasonable doubt, all elements of the crime of premeditated attempted murder, including the requisite intent on the part of the perpetrator. The jury instructions did not omit any of the elements of the charged offense, nor did they instruct the jury to presume that any such element existed. Under the instructions, a finding of intent to kill by the perpetrator was a pre-requisite to petitioner's liability, whether the jury found (as it apparently did not) that the perpetrator was petitioner, or whether it found the perpetrator to be one of the two unnamed and unidentified men in the back seat. There was, therefore, no violation of In Re Winship or its progeny. See Soilis 219 F. 3d at 926 (finding no In re Winship violations when instructions on second degree murder under the natural and probable consequences doctrine did not omit any element of the crime).

Accordingly, the state courts' denial of petitioner's claim was not clear error and was neither contrary to nor an unreasonable application of clearly established federal law as established by the United States Supreme Court. Petitioner, therefore, is not entitled to federal habeas relief. 28 U. S. C § 2254 (D) (1)

RECOMMENDATION

For all the foregoing reasons, IT IS RECOMMENDED, that he Court issue an Order: (1) approving and adopting the Report and Recommendation; (2) denying the Petition; and (3) directing that judgment be entered dismissing this action with prejudice

DATED: September 30, 2002

_____

MARGARET A NAGLE
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections a s provided in the Local Rules Governing the Duties of Magistrates and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

ITEM 2

UNITED STATES COUR OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK HAYES. Junior	)	No. 02 - 57031
	)	
Petitioner and Appellant	)	D.C. No. CV 98 00052
	)	RT Central California
vs.	)	(Riverside)
	)	
LARRY SMALL, Warden et al.,	)	ORDER
	)	
Respondents/ Appellees	)	
	)	
	)	

Before SILVERMAN and GRABER, *Circuit Judges*.

The request for certificate of appealability is denied.

See 28 U. S., C § 2253 (c) (2)

FILED

FEB 0 2 2004

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ITEM 3

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA -

EASTERN DIVISION

FREDERICK HAYES, JR., Petitioner, v, LARRY SMALL, Warden Respondent	NO. CV 98-0052 - RT (MAN) ORDER (1) ACCEPTING AND ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND (2) DENYING THE PETITION F OR WRIT OF HABEAS CORPUS

Pursuant tto 28 U. S. C. § 636, the Court has read and considered the Petition for Writ of Habeas Corpus (" Petition "), Respondent's Return, Petitioner's Traverse, all of the records herein, the Report and Recommendation of the United States Magistrate Judge, and Petitioner's objection. Further, the Court has

engaged in a de novo review of those portions of the Report to which Petitioner has objected in writing.

IT IS ORDERED that (1) the Court accet5s and adopts the Report, (2) the petition is denied, and (3) judgment be entered denying the Petition.

Dated: 10/24/02

ROBERT R. TIMLIN
United States District Judge

ITEM 4

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA -

EASTERN DIVISION

FREDERICK HAYES, JR., Petitioner, v. LARRY SMALL, Warden, Respondent	NO. CV 98-0052 - RT (MAN) JUDGMENT

Pursuant to the order Accepting and Adopting the Report and Recommendation of United States Magistrate Judge, and denying the Petition for Writ of Habeas Corpus (" Petition ")

IT IS ADJUDGED that the Petition is denied

DATED: 10/24/02

ROBERT J. TIMLIN
United States District Judge

ITEM 5

JOHN DE HART
ATTORNEY AT LAW
1731 McCollum Street
Los Angeles, California 90026
(213) 644 5500

Attorney for the Petitioner

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

FREDERICK HAYES, JR., Petitioner, vs. LARRY SMALL, in his capacity as Warden of the Calipatria State Prison, Respondent, DAN LUNGREN, Attorney General of The State of California, Additional Respndent.	CASE NO. PETITION FOR WRIT OF HABEAS CORPUS

TO: The Chief Judge and Judges of the United States District Court for the Central District of California:

Petitioner most respectfully represents to the Court:

1. That this is a Petition for Writ of Habeas Corpus by a Prisoner in State Custody. This Court has jurisdiction of the matter pursuant to the provisions of 28 U. S. C. § 2254 (d) (7) in that the Petitioner was denied due process of law in a State court proceeding.

2. The Petitioner has exhausted all of the State remedies available to him in connection with the grounds stated in this petition.

3. The Petitioner is currently incarcerated in the Calipatria State Prison at Calipatria, California.

4. Petitioner is serving a sentence pursuant to a judgment of the Superior Court of the State of California for the County of Riverside.

5. Petitioner was charged with four counts of attempted murder with enhancements for a racially motivated crime, great bodily injury and personal firearms use. Petitioner was represented by Mr. David Gunn, a public defender, and entered a plea of not guilty as to all charges. Trial was conducted before a jury beginning on March 22nd, 1995 before the Honorable Edward D.

Webster, Judge Presiding. Petitioner testified at the trial. The Petitioner was found guilty of four counts of attempted murder and that the race enhancements were true. Great bodily injury and personal firearms use as against the Petitioner were dismissed, the jury being unable to agree on this charges.

6. Petitioner took a direct appeal from the judgment of conviction to the Court of Appeal, Fourth Appellate District of the State of California. On appeal the Petitioner was represented by Appellate Defenders, Inc., On February 26, 1997, the Court of Appeal filed an opinion affirming the conviction. There is attached hereto a copy of the opinion of that Court affirming the judgment. A petition for review to the Supreme Court of the State of California was denied. in an order filed March 18th, 1997.

7. Other than the direct appeal described above the Petitioner has not filed any other petitions or proceedings. There are no other applications or petitions now pending. There are no other charges, or convictions, or future sentence, as against the Petitioner

8. At the trial of the Petitioner no evidence was presented and the jury made no findings with respect to the intent of the ultimate perpetrator (shooter). Petitioner was convicted as an aider and abetter without findings by the jury of every element of the offense resulting in a denial of the petitioners Federal Constitutional rights under the due process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States in that the jury did not determine, beyond reasonable doubt every element of the offense (attempted murder) for which the Petitioner was convicted and is subject to punishment.

9. At the trial of the of the Petitioner the trial court improperly failed to instruct the jury that the jury must determine all of the elements of the ultimate offense (the offense for which the Petitioner is subject to punishment) must be found true in order to convict the Petitioner as an aider and abetter. The failure of the Trial Court to present the issue to the Jury resulted in a denial of the Petitioner's Federal Constitutional rights under the due process

provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, Petitioner prays that the Court grant Petitioner such relief to which he may be entitled in this proceeding.

Dated: February , 1998

JOHN DE HART
Attorney for the Petitioner

ITEM 6

JOHN DE HART
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(213) 644 5500

Attorney for the Petitioner

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

FREDERICK HAYES, JR.,	)
	) CASE NO.
Petitioner,	)
	)
vs.	) POINTS AND
	) AUTHORITIES
LARRY SMALL, in his capacity as Warden of the Calipatria State Prison,	) IN SUPPORT) OF PETITION) FOR HABEAS
Respondent,	) CORPUS
	)
DAN LUNGREN, Attorney General of The State of California,	))
	)
Additional Respndent.,	)
	)
_____	)

Introductory Statement

Under the factual situation presented in this case the application of the vicarious criminal liability of an aider and abettor under the California natural and probable consequences decisional rules to the Petitioner is a denial of the Petitioners right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. The United States Constitution requires that the prosecution prove every essential element of the charged crime and that the jury be instructed on every essential element of the charged crime. To the extent that the natural and probable consequences doctrine in California relieves the prosecution from proving every essential element of the crime or relieves the Court from instructing the jury on every essential element the doctrine violates the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. The prosecution was required to prove, and the Trial Court was required to instruct the jury, that mens rea for first degree murder (malice and intent

to kill) must be proved and to identify the " target offense "[1].

2.

Procedural Background

Prior to this incident the Petitioner had never been arrested for any offense. The Petitioner was charged on July 8th, 1994 in a complaint filed in the Municipal Court of the County of Riverside with the crimes of attempted murder, four counts, race enhancements, great bodily injury enhancements, personal firearm use enhancement. Petitioner was held to answer and trial for Petitioner and a co-defendant, was conducted, before a jury, in the Superior Court of the State of California for the County of Riverside beginning on March 22nd, 1995, before the Honorable Edward D. Webster. The Petitioner was found guilty on all four counts and the jury found that the attempted murders were willful, deliberate and premeditated. that the race enhancement was true. The jury did not agree on the great

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1. Target offense as used and defined in People vs. Prettyman, 1996, 14 Cal. 4th, 248.

bodily injury enhancement and personal firearms use as against the Petitioner and those enhancements were dismissed by the Court On May 5, 1995, the petitioner was sentenced to four consecutive indeterminate life terms, with the possibility of parole, plus three years on each of the race enhancements for a total of 12 years to be served consecutively.

Petitioner appealed to the Court of Appeals, Fourth Appellate District, Division Two. The conviction was affirmed in a partial publication opinion filed February 26, 1997. A Petition for Review addressed to the California Supreme Court was denied on March 18th, 1997 Petitioner is currently in the custody of the Department of Corrections of the State of California at Calipatria State Prison .

Factual Background

A detailed discussion of the factual background of this matter appears in the opinion of the Court of Appeal, Fourth Appellate District, of the State of California, copy of

which is annexed to this petition. The Court is respectfully directed to that opinion for the factual background of this matter.

On July 5, 1994 about 3:00 o'clock P. M Venus Blankenship and Nominick Hayes were at an Arco gas station in Riverside. Four Hispanic males in a vehicle parked in the station. Two Hispanic males from the vehicle and one who came into the area on a bicycle approached Nominick. After a brief discussion in which gang references were made Nominick was struck with a beer bottle after which he ran from the area. About 5:00 o'clock P. M., of the same day the defendants (Petitioner and Ventrice Lajuan Laster, who are afro - American) borrowed a car and went looking for Nominick. Mr. Laster was driving the vehicle and stopped and picked up two other afro - American males individuals. They set out to find Nominick. At some point they came to the school yard where this incident took place. When the vehicle stopped at a traffic signal, adjacent to a school yard where several Hispanic individuals were engaged in sports and other activities, the passenger in the rear right seat of the vehicle fired several shots into the school yard. The

individual who fired the shots was never identified by the police or apprehended

4.

FIRST GROUNDS FOR THE ISSUANCE OF THE WRIT

A Conviction for Aiding and Abetting Without Proof of the Offense Commited by the Perpetrator Violates Petitioner's Federal Constitutional Right to Due Process of Law.

The prosecution proceeded on the theory that the Petitioner was the perpetrator (shooter) and that even if the Petitioner was not the shooter (perpetrator) that he was liable for attempted murder on an aiding and abetting theory, The jury did not reach a verdict as to the Petitioner on the great bodily injury enhancement and personal firearm use as against Petitioner. Therefore, the jury believed that the Petitioner was not the shooter (Ultimate Perpetrator). The trial court then struck the great bodily injury and personal firearms use as against the Petitioner. (see Opinion of the Court of Appeal, 4th District, Division Two, page 12,

attached) There is clearly an implied finding that the Petitioner was not the perpetrator. The conviction if it is to stand at all must stand on the theory that the Petitioner was an aider and abettor of the crime.

The due process clause of the United States Constitution protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Carella vs. California, 491 US 263, 105 L. Ed 2d 218, 109 S. Ct 2419. United States vs. Laughlin, 397 U. S. 1523, 1527 ; In Re Winship, 197 U. S. 358, 90 S. Ct 1068, 1073 (1970) Furthermore a conviction based on a legally inadequate theory must be vacated. . United States vs. Lewis, 67 F. 3d 225, 234 n. 15 (9th Cir 1995) United States vs. Barona 36 F. 3d 1087, 1098 (9th Cir, 1995) Yates vs. United States 354 U. S. 298, 77 S. Ct 1064 (1957); Griffin vs. United States 112 S. Ct at 474

A " defendant cannot be convicted of aiding and abetting absent proof that the underlying offense was committed. " United States vs. Bosch, 914 F. 2d 1239, 1241 (9th Cir 1990); United States vs. Motley, 940 F 2d 1079,

1081 (9th Cir 1986); " It is hornbook law that a defendant charged with aiding and abetting the commission of a crime by another cannot be convicted in the absence of proof that the crime was actually committed " (reversing a conviction under aiding and abetting instruction that did not require a finding that the underlying offense was committed.) United States vs. Ruffin 613 F. 2d 408, 412 (2d Cir 1979.)

California law recognizes the principal that the aider and abettor cannot be guilty of a greater offense that the principal offender. People vs. Williams 75 Cal. App. 3d 731, 142 Cal. Rptr. 704, 708 (1977); People vs. Petruzo, 13 Cal. App. 569, 577 (1910); People vs. Sidelinger, 9 Cal. App. 298, 299 (1908).

Where a crime, as defined, requires proof of criminal intent a conviction without proof of such intent cannot stand. . People vs. Simon, 9 Cal. 4th 493, 519 - 522; , Staples vs. United States 511 U. S. 128 L. Ed 2d 608 Ratzlaf vs. United States 510 U. S. 126 L. Ed. 2d 615

In People vs. Patterson,, 1989, 209 Cal. App. 3d 610, 257 Cal. Rptr. 407 the Court of Appeals for the Fourth District (the same District that affirmed the Petitioner's

conviction) the Court held that proof of the conduct of the perpetrator constituted attempted murder was required in order to convict the defendant of that crime as an aider and abettor. That Court said in part:

" Contrary to the People's assertion, this fact is not changed by

by the fact Patterson was tried and convicted as an aider and abettor. A defendant's culpability for attempted murder as an aider and abettor necessarily depends on the commission of the crime by the perpetrator. In order to convict the perpetrator of attempted murder the jury must find that he had the requisite express malice and specific intent to kill. If no such finding is made that person is not guilty of attempted murder. If the perpetrator cannot be convicted of attempted murder without a finding of express malice and intent to kill then no lesser standard should apply to an aider and abettor simply because his liability extends to " the natural and reasonable consequences " of the act he knowingly and intentionally aids and encourages (People vs. Beeman, 1984, 35 Cal. 3d 547, 560, 199 Cal. Rptr. 60) "

People vs. Patterson , 209 Cal App. 3d 610, 614

A detailed discussion of the doctrine of aiding and abetting appears in the decision of the California Supreme Court in People vs. Prettyman, 1996, 14 Cal. 4th 248. People vs. Patterson, quoted above was not mentioned in

Prettyman and Patterson is thereby approved by the Supreme Court of California.

See also People vs. Solis (1993) 20 Cal. App 4th 264 at 273, fn 7 " either the aider and abettor is guilty of the serious crime committed by the perpetrator or he is not guilty at all. " (reversed on other grounds. also decided by the 4th District Court of Appeals)

" Intent is what must be proved; from a person's action with knowledge of the purpose of the perpetrator of a crime, his intent to aid the perpetrator can be inferred. In the absence of evidence to the contrary, the intent may be regarded as established. **But where there is room for doubt that a person intended to aid a perpetrator - his knowledge of the perpetrator's purpose will not suffice** " People vs. Beeman, 1984, 35 Cal. App. 3d 547, 558; 199 Cal. Rptr. 60[2] (bold emphasis added) The Petitioner knowledge of the perpetrators purpose is tangential. Although there is some

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2. It cannot be overlooked that while Beeman considered the " intent " component of the aiding and abetting doctrine the result was that a single word was added to the definition. The jury was not provided with any instruction on the legal meaning of " intent "

possibility that the jury could have found that the Petitioner could have had some knowledge of the intent of the co-defendant, (Perpetrator) driver of the vehicle it is difficult if not impossible to reach the conclusion that the Petitioner could have intended the conduct of the (Perpetrator) shooter (passenger in right rear seat) or that the (perpetrator) shooter had the intent to kill In all events there is " room for doubt " that the Petitioner had knowledge of the perpetrator's (shooters) purpose. It is not sufficient to infer the Petitioner had a particular intent based solely from his voluntary acts. Beeman, supra, at page 559, Sandstrom vs. Montana, (1979) 442 U. S. 510, 522, 61 L. Ed 2d 39, 49 - 50, 99 S. Ct. 2450; Morissette vs. United States (1952) 342 U. S. 246, 274-275, 96 L. Ed 288, 306-307, 72 S. Ct. 240. All that the Petitioner did was to get into a vehicle. " The focus on mental state instead of conduct in explaining culpability under a theroy of aiding and abetting reflect judicial awareness of the fundamental principle that criminal conduct does not arise from conduct alone but rather conduct accompanied by a guilty state of mind, that is, a union or joint operation of act and intent. [citing case] As a

theory of liability, aiding and abetting must be consistent with this principle. People vs. Campbell, (1994) 25 Cal. App. 4th 402, 413; 30 Cal. Rptr. 2d 525

" Although the perpetrator and the aider and abettor need not be tried jointly, the jury first must determine the crime and degree of crime originally contemplated and committed, if any, by the perpetrator. Next the jury must decide whether the aider and abettor knew of the perpetrator's intent to commit the originally contemplated criminal acts and whether the aider and abettor intended to encourage and facilitate the commission of those acts. People vs. Woods, (1992) 8 Cal. App. 4th 1570, 1586, 11 Cal. Rptr. 2d 231. In Woods the trial court was asked by the jury if the aider and abettor could be convicted of a lesser offense then the perpetrator. The trial court answered in the negative. The Court of Appeal reversed holding that the Petitioner (an aider and abettor) ws entitled to a Writ of habeas Corpus unless the People accepted a reduction of the sentence to second degree murder.

To summarize the culpability of the Petitioner, as an aider and abettor must depend on the act (mens rea - intent

to kill) of the perpetrator of the ultimate offense and it is not constitutionally permissible to find the Petitioner guilty of the ultimate offense without proof of all of the elements of the ultimate offense. No evidence was adduced and no jury finding was made, on the degree of guilt of the perpetrator (shooter) of the ultimate offense . It is not sufficient that the jury might have found that the Petitioner aided the driver of the vehicle elements of the ultimate crime must be proven and the jury must have the opportunity to make a factual determination concerning those facts. By resorting to the natural and probable consequence doctrine in this case the Court found that only proof of the predicate or target offense need be proved and that no proof of the ultimate offense (attempted murder) need be presented or determined by the jury. This relieved the People from proving every element of the offense for which the Petitioner is being punished (attempted murder) without proof of beyond a reasonable doubt thereby denying Petitioner his due process rights. Carella vs. California (1989) 491 U. S. 263, 105 L. Ed 2d 218, 109 S. Ct 2450.

The prosecution proceeded on the alternative theories that the Petitioner was either the perpetrator (shooter) or that he is vicariously liable as an aider and abetter. The prosecution could not constitutionally be relieved of any burden of proof by proceeding on alternative theories. Instead the prosecution had the alternative burden of proving either the Petitioner guilty of all of the elements of first degree murder and failing in that presenting proof of all of the elements of aiding and abetting. .

With respect to proof of intent to kill the only evidence adduced at the trial was that the 18 year old Petitioner got into a vehicle with an older relative (the co-defendant), that the driver of the vehicle went to pick up two other unidentified acquaintances and that they drove to the school yard where the incident took place.

The jury was not asked to, and did not, determine the identify of the perpetrator (shooter) . The Petitioner was convicted of aiding and abetting without proof of the mens rea, express malice and intent to kill, of the perpetrator. (shooter) Nor was there any proof that anyone harbored the

requisite men rea. This violates the Petitioner's right to due process of law under the Fifth and Fourteenth Amendment to the United States Constitution. Petitioner is entitled to this Writ.

5.

SECOND GROUNDS FOR ISSUANCE OF THE WRIT

Federal Due Process Requires That the Jury be Instructed on Every Essential Element of the Offense

First degree murder requires an intent to kill and an aider and abettor cannot be convicted or attempted murder absent a showing of intent to kill by the perpetrator People vs. Patterson , 209 Cal App. 3d 610, 614; People vs. Beeman, 1984, 35 Cal. 3d 547, 560, 199 Cal. Rptr. 60 No instruction was given to the jury on the intent of the perpetrator (shooter) in the event that the jury did not find that the Petitioner was the perpetrator (shooter).[3] When the prosecution relied upon alternative theories that the

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3. Nor was the jury given any lesser included offenses instructions concerning the attempted murder charge

Petitioner was either the shooter, or equally guilty as an aider and abettor the Trial Court had the duty to so instruct. This failure denied the Petitioner of his right to have the jury find each element of the crime beyond a reasonable doubt and was a denial of the Petitioner's due process rights under the Fifth and Fourteenth Amendment to the Constitution of the United States.

A jury must have the opportunity to find each element of the crime charged beyond a reasonable doubt. Insufficient or defective jury instructions can violate this requirement by effectively allowing the government to presume the element of intent. In Re Winship, 397 U. S. 358, 90 S. Ct 1068, 25 L. Ed 2d 368 (1970); Carella vs. California 491 U. S. 263, 268-269, 270, 109 S. Ct 2419, 105 L. Ed. 2d 218 (1989); Martinez vs. Borg, 937 F. 2d 422 (9th Cir., 1991)

Alternative theories of prosecution, in this case that either the Petitioner was the shooter (Perpetrator) or in the alternative was guilty as an aider and abettor cannot constitutionally lessen the burden or proof of the prosecution, it increases it. It also increases the duty or the

trial court to give appropriate instruction. The jury was given no guidance on how they should proceed in the event that the found the Petitioner was not the perpetrator (shooter). This conviction is supported by unguided speculation and is impermissible.

6.

Substantial and Injurious Effect is Standard for Non-Structural Error

The standard, on habeas corpus proceedings, for error in trial jury instructions is " whether the error had substantial and injurious effect or influence in determining the jury's verdict. " California vs. Roy, 519 U. S. _____ 136 L. Ed 2d 266; 117 S. Ct_____. In California vs. Roy the United States Supreme Court considering a Beeman error held that the failure to instruct the jury with respect to intent that the substantial and injurious effect was the standard to be applied to such error. " Where a judge " is in grave doubt as to the harmlessness of an error the habeas petitioner must win " O'Neal vs. McAninch, 513 U. S. _____ 130 L. Ed 2d 947, 115 S. Ct 992 (cited in California vs. Roy, supra)

The facts in the present petition closely parallel the fact and the decision in California vs. Roy. There was an error on the trial level in the giving of an appropriate **intent** instruction. The absence of proof of the intent of the perpetrator must create grave doubt as to the harmlessness of the error and justify the granting of this Writ, as was done in California vs. Roy.

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7.

Conclusion

The jury did not find the Petitioner was armed or that he inflicted great bodily injury. Implicit in that finding is that the Petitioner was not the shooter and was convicted as an aider and abettor. The jury was not instructed and did not find that the conduct of the perpetrator (shooter) was first degree murder. In fact no person was found to have the intent to kill. Instead the prosecution offered the driver as

the perpetrator of the target offense aided and abetted. The net effect under the instructions given to the jury the prosecution did not have to prove the ultimate offense, attempted murder. The prosecution was only required by the instructions to prove the driving of a vehicle from which a firearm was discharged. The natural and probable consequence doctrine of aiding and abetting cannot relieve the prosecution from the obligation to prove every element of the crime for which the Petitioner will be punished. Petitioner is being punished severely for attempted murder without any proof, instructions or finding by the jury on the elementgs of the ultimate crime for which the Petitioner stands convicted and is being punished. The intent to kill was an absolute requirement and was never shown. This " necessarily rendered the trial fundamentally unfair " People vs. Odle, 45 Cal 3d 386.

The Petitioner asks tht the Court by its decision in this matter promulgate rule that a defendant is entitled to jury instructions and a finding by the jury on all criminal conduct for which the defendant will be punished.

Petitioner is entitled to a jury properly instructed and a finding on every essential element, and this writ should be granted.

Dated: February 18th, 1998

respectfully submitted,

JOHN DE HART

ITEM 7

UNITED STATES DISTRICT COURT

THE CENTRAL DISTRICT OF CALIFORNIA -

FREDERICK HAYES, JR.	)	NO. CV 98-0052 - RT
	)	(MAN)
Petitioner,	)	
	)	ORDER REQUIRING
	)	RETURN TO THE
v.	)	PETITION FOR WRIT
	)	OF HABEAS CORPUS
LARRY SMALL, Warden,	)	
	)	
	)	
Respondent	)	
	)	
	)	

In order to facilitate the just, speedy and inexpensive determination of this action **IT IS ORDERED** that:

1. The Clerk shall promptly (a) serve a copy of the petition and copy of this Order on respondents by delivering them to the Attorney General for the State of

California, or his authorized agent, and by serving a copy of this Order on Petitioner.

2. Respondent shall file and serve a Return to the petition within sixty (60) days of the date of this Order. Respondents shall expressly state in their Return whether or not they contend that the Petition is untimely, unexhausted or successive, and further:

(a) If urging that the Petition is barred by the one-year statute of limitations, respondent shall specify in their return " the date on which he [petitioner's state court] judgment became final by the conclusion of direct review or the expiration of time for seeking such review 28 U.S.C §. 2244 (d) (1) (a), or " the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence " 28 U.S. C. § 2244 (1) (D), and the time during which a properly filed application for state post-conviction review was pending 28 U. S. C. § 2244 (d) (2).

(b) If urging petitioner has failed to exhaust state court remedies, respondents shall specify the remedy which is still available to petitioner (Respondent shall

carefully examine the question of exhaustion of state court remedies as to all grounds of the Petition, including the exhaustion of a federal legal issue, as required by Anderson v. Harless, 459 U. S 4, 6 (1982)

3. Respondents shall lodge with the court, copies of all petitions filled by petitioner in the State Supreme Court, and all state court transcripts, briefs, orders, opinions, and other records as are necessary to support the return of the petition. The outside of each envelope shall specify the documents contained herein. Where consideration on the merits requires this Court to make an independent review of the record, respondent's return must include citations to the transcript of the state proceedings, citation to state court opinions alone are insufficient.

4. All exhibits to the Return shall be page numbered consecutively with the Return tabbed, as required by Local Rule 3.6, to as to facilitate ease of reference., The Return must cite the page number of any exhibit or documents used to support any statements in the return

5. Petitioner my file a single Traverse responding to matters raised in the Return within sixty (60) days of

service of the Return. Any Traverse filed by petitioner; (a) shall state whether petitioner admits or denies each allegation or act contained within the Return; (b) shall be limited to acts or arguments responsive to matters raised in the Return; and (c) shall not raise new grounds for relief that were not asserted in the Petition. **Petitioner is admonished that failure to file a Traverse may result in the allegations of the Return being accepted as true pursuant to 28 U. S. C. § 2248**

6. A request for an extension of time within to file a Return or Traverse will be granted only upon a showing of good cause. Any such request shall be accompanied by a declaration explaining why an extension of time is necessary accompanied by a proposed form of order granting the requested extension.

7. Unless otherwise ordered by the Court, this action shall be deemed submitted for decision upon the filing of petitioner's Traverse.

8. Every document submitted to the Court must include proof of service attesting that a copy of such document was served on opposing counsel (or on the

opposing party, if such party is not represented by counsel). Any document submitted to the Court without a proof of service will be returned to the submitting party and will not be considered by the Court.

9. Petitioner shall immediately notify the Court and counsel for respondents of any change of petitioner's address. **If petitioner fails to keep the Court informed of where petitioner may be contacted, this action may be dismissed.**

DATED: March 11, 1998

_____

MARGARET A
UNITED STATES MAGISTRATE
JUDGE

ITEM 8

JOHN DE HART
ATTORNEY AT LAW
1731 McCollum Street
Los Angeles, California 90026
(213) 644 5500

Attorney for the Petitioner

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

FREDERICK HAYES, JR., Petitioner, vs. LARRY SMALL, Warden, Respondent.	NO. EDCV 98-0052 RT PETITION CERTIFICATE APPEAL-ABILITY

The Honorable Robert J. Timlin, United States District Judge:

Frederick J. Hayes, Jr. most respectfully petitions that a certificate of appealability be issued in order to

permit him to pursue an appeal to the United States Ninth Circuit Court of Appeals. from the dismissal of his Petition for Writ of Habeas Corpus,

1.

Procedural Background

Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court on February 23rd, 1998. . On September 30th, 2002, The Honorable Margaret A. Nagle, Magistrate Judge, filed a Report and Recommendation that the petition be dismissed. The Honorable Robert J. Timlin United States District Judge accepted the recommendation and dismissed the petition.

Within the time set forth in Federal Rules of Appellate Procedure, Rule 4, the petitioner filed a Notice of Appeal. In order to perfect the appeal the petitioner is now required by 28 U. S. C. § 2253 (c) to obtain a Certificate of Appealability. (COA) The District Court is required by the provisions of Federal Rules of Appellate Procedure 22 (b) (1) to either issue a Certificate of Appealability or state why one should not issue.

For the reasons hereinafter set forth the Petitioner most respectfully asks that a Certificate of Appealability issue permitting appellate review of the following issues:

1. May a conviction be based upon the doctrine of aiding and abetting and natural and probable consequences where there is no evidence of the mens rea of the perpetrator ? Or does such a conviction violate due process of law ?

2. May the prosecution lessen its burden to present evidence of every element of a crime by artful or creative charging ? Or does artful charging deny petitioner due process of law ?

Factual Background

The background of this matter is fully discussed in the Report of the Magistrate. Petitioner would only emphasize that the jury impliedly found that the petitioner did not fire the weapon and that the only evidence adduced at the trial of the mens rea of the perpetrator was that the perpetrator filed the weapon.

Standard for Granting

Standards for the granting of a Certificate of Appealability are set forth in Barefoot vs. Estella 163 U. S. at 894, 103 S. Ct 3383.

" In Barefoot, the Court established several ways in which a petitioner can make the " substantial showing of the denial of a constitutional right " To meet thithreshold inquiry." Slack120, S. Ct, the petitioner must demonstrateThat the issues are debatable among jurists of reason; that a court could resolve issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.

Lambright vs. Stewart (9th 2000 ,)

220 F 3d 1022, 1024 - 1025

Any doubts whether a CPC (now COA) should be issued are to be resolved in favor of the Petitioner. " obviously the petitioner need not show that he should prevail on the merits. He had already failed in that endeavor " Lambright vs. Stewart (9th 2000,) 220 F 3d 1022, 1025 citing Barefoot vs. Estella 163 U. S. at 894, 103 S. Ct 3383. And the Seventh Circuit has held that " a COA " should issue unless the claims are " utterly without merit " Jefferson vs. Welborn 222 F 3d 286, 289 (7th 2000) cited in Lambright vs. Stewart (9th 2000,) 220 F 3d 1022, 1025

4.

State of Mind of Perpetrator

The only evidence offered to the jury was that the unknown perpetrator who was in the back seat of the vehicle fired approximately 20 rounds from a weapon into a schoolyard where several individuals were engaged in various activities. Four people were hit.

There was no evidence adduced at the trial that the perpetrator knew any of the victims or that he intended to kill anyone. The only evidence upon which the jury could reach a decision as to the mental state (mean rea) of the perpetrator was that he fired a weapon into an area where there were several people.

The California courts have repeatedly held that the mere firing of a weapon, without more, is insufficient to show the necessary malice and intent to kill

In People vs. Ratliff, 1986, 41 Cal. 3d 697, at 717, the killing occurred during a robbery. The people argued that the very method of killing established defendant's intent to kill. The California Supreme Court opined that:

> " As we previously observed in the context of evidence of defendant's attempted murder conviction, however, the fact that defendant shot his victims at close range though certainly strongly indicative, was not conclusive evidence of an intent to

kill but may have merely demonstrated an intent to disable. "

People vs. Ratliff, 1986,

41 Cal. 3d 697, at 717,

citing as authority:

People vs. Hayes (1985)

38 Cal. 2d 780, 787 - 788

and to the same effect:

People vs. Woods (1991)

228 Cal. App. 3d 1037, 1048 [citing Ratliff]

No authority has been cited that the mental state of the perpetrator(malice, intent to kill) can be inferred from the act of firing a weapon alone. The magistrate judge relied upon United States vs. Powell, 806 F 3d 1421 (9th Cir, 1986) for the proposition that a principal can be convicted of aiding and abetting an unidentified perpetrator. Powell involved vehicle odometers, a far different standard then attempted murder and does not stand for the proposition that the intent to kill can be inferred from the mere firing of a weapon.

The report of the Magistrate concedes, at page 23 of the report, that the prosecution must prove that the charged offense has been committed and that the perpetrator had the requisite intent. United States vs. Powell, 806 F 2d 1421 (9th Cir 1986) The Magistrate then concludes that the issue was properly presented to the jury under correct instructions and the jury found the requisite intent and that's the end of it. Petitioner disagrees.

5.

Pleading of Minor Offense as Basis to
Convict on Serious Charge by Resort to
Aiding and Abetting

It is obvious that the prosecution could not provide the mens rea of the perpetrator so that prosecution resorted to the devise of charging a relative minor offense (permitting the firing of a weapon from a motor vehicle) as a platform to convict the petitioner of the very serious offense of attempted murder using the aiding and abetting and natural and probable consequences rules.

The California Court of Appeals commented with approbation on this process. The petitioner most respectfully suggests that rather than be approved that this procedure must be condemned as a denial of due process of law guaranteed by the United States Constitution.

Where a young man is placed in custody for what my be the rest of his life (four consecutive life terms) the conviction should not be based on gamesmanship. It is the obligation of the District Attorney to seek the truth not obtain a conviction by the use of a charging devise. Artful pleading and pleading devises are no substitute for a fair trial and conviction.

Due process protects an accused from conviction unless the prosecution proves, beyond a reasonable doubt, every element of the charged offense. In Re Winship, 397 U. S. 358, 90 S. Ct 1068, 1072 - 73 (1970) The obligation to prove, beyond a reasonable doubt cannot be lessened or diminished by artful pleading and resort to " natural and probable consequences ". Consider the instant case, the

prosecution only had to prove that a weapon was fired by someone which allowed the jury to find that the " natural and probable consequences " were that there was an attempted murder.

On the other hand if the prosecution had charged the petitioner with attempted murder it had the burden of providing evidence that the perpetrator had the requisite intent to kill. I suggest that the prosecution could not prove the mens rea of the perpetrator if the petitioner were charged with attempted murder.

The constitutional protection of due process cannot be so fragile as to be so easily circumvented by artful pleading.

6.

Conclusion

Any doubts whether the Certificate of Appealability should issue are to be resolved in favor of granting Lambright vs. Stewart, 220 F. 3d 122, 1025 (9th 2000,) and the COA should issue unless the claims are utterly without merit. Whether or not a conviction of attempted murder will stand where it is procured by

inventive pleading and is unsupported by any direct evidence of the mens rea of the perpetrator ,meets all of the requirements for issuance of a COA. Certainly these are issues that are debatable among jurists; a Court could resolve the issues in a different manner; and the questions are adequate to deserve encouragement to proceed further. Lambright vs. Stewart, 220 F. 3d 122, 1025 (9th 2000,) The Certificate of Appealability should issue.

Dated; November 20th, 2002

JOHN DE HART

Attorney for the Petitioner

ITEM 9

UNITED STATES COUR OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK HAYES, Junior	)	No. 02 - 57031
	)	
Petitioner and Appellant	)	D.C. No. CV 98 00052
	)	RT Central California
vs.	)	(Riverside)
	)	
LARRY SMALL, Warden	)	
et al.,	)	ORDER
	)	
Respondents/ Appellees	)	
	)	
_____	)	

Before, BEEZER and McKEOWN, Circuit Judges.

Consideration of the request for certificate of appealability shall be held in abeyance pending the California Supreme Court's resolution of People v. Lee, 20 P. 3d 1085 (Cal 2001). Within 21 days of the California Supreme Court's disposition of people v. Lee the parties shall file in this court status report or motions for appropriate relief.

Proceedings in this case are suspended pending further order of the court. The Clerk shall serve this order on the parties certified mail, receipt requested.

ITEM 10

UNITED STATES DISTRICT COURT

THE CENTRAL DISTRICT OF CALIFORNIA -

FREDERICK HAYES, JR.	)	NO. CV 98-0052 - RT
	)	(MAN)
Petitioner,	)	
	)	ORDER DENYING
	)	CERTIFICATE OF
v.	)	APPEALABILITY
	)	
LARRY SMALL, Warden,	)	
	)	
Respondent	)	
	)	
_____	)	

On October 28, 2002, Judgment was entered denying the Petition for Writ of HABEAS CORPUS (Petition ") filed in this action. On November 7, 2002, Petitioner filed a Notice of Appeal, by which he seeks to appeal the October 28, 2002 Judgment. Under 28 U. S. C. § 2253 (c) (1) (A) an appeal my not be taken from a " final order in a habeas

corpus proceeding in which the detention complained of arises out of process issued by a state court " unless the appellant first obtains a certificate of appealability (" COA "). Although Petitioner is represented by counsel, he has not requested a COA. However, the Court will treat the Notice of Appeal as such a request. See Slack vs. McDaniel 529 U. S. 473, 483, 120 S. Ct 1595, `1603; United States v. Martin 22 F 3d 1042, 1046 (9th Cir. 2000).

" A certificate of appealability may issue only if the applicant has made substantial showing of the denial of a constitutional right 28 U. S. C. 2253 (c) (2). In Slack, supra, the Supreme Court clarified the showing required to satisfy Section 2253 (c) (2) and to warrant issuance of a COA, when a habeas petition has been denied on the merits, such as in this case.

> To obtain a COA under § 2253 (c), a habeas prisoner must make a substantial showing of a denial of a constitutional right a demonstration that, under *Barefoot* (Barefoot v. Estelle 463 U. S. 880, 103 S. Ct. 3383 (1983), includes showing that reasonable jurists could debate whether, (or,

for that matter agree, that) the petition should have been resolved in a different manner or that issues were " adequate to deserve encouragement to proceed further " [cit om.]

Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy § 2253 (c) is straightforward; The Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

529 U. S. at 483-484, 120 S. Ct. at 1603 - 04

Petitioner raised two claims in his Petition, each resting on his contention that the jury had been allowed to find him guilty on an aiding and abetting theory without finding, beyond a reasonable doubt, the perpetrator's required intent, in violation of due process. The United States Magistrate Judge concluded that the state court's rejection of Petitioner's claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent, because the jury was properly instructed that it must find, beyond a reasonable doubt, all elements of the crime as

defined by state law, including the perpetrator's intent to kill, before Petitioner could be convicted. (See Report and Recommendation at 16 - 26) After carefully considering the record, including Petitioner's Objection, the Court accepted and adopted the Magistrate Judge's finding and conclusions, by Order filed October 28, 2002.

By his Notice of Appeal, Petitioner apparently seeks to appeal denial of each of his habeas claims. The Court remains satisfied that the denial of Petitioner's claims was correct and that the issuance of a COA is not warranted. The Court concludes that reasonable jurists would not find its decision on Petitioner' claims to be " debatable or wrong Slack 590 U. S. at 484, 120 S. CT 1603. The Court also concludes that the issues raised by Petitioner are not " adequate to deserve encouragement to proceed further " id. Petitioner has not made the required substantial showing of the denial of a constitutional right " and has not satisfied Section 2253 (c) (2). id

Accordingly, issuance of a certificate of appealability is not warranted and petitioner's request for a COA is DENIED.

IT IS SO ORDERED

DATED: 11/19/02

_____

ROBERT J. TOMLIN
UNITED SATES DISTRICT JUDGE

PRESENTED BY:

_____

MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

ITEM 11

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. : EDCV 98-0052 RT (MAN)

Date: March 5, 2002

DOCKET ENTRY: Order re status of petition

PRESENT: THE HONORABLE MARGARET A. NAGLE, U. S. MAGISTRATE JUDGE

Earlene Carson	N/A
Deputy Clerk	Tape No./Court Reporter
ATTORNEYS PRESENT FOR PETITIONER	ATTORNEYS PRESENT FOR RESPONDENT (S);
None Present	None Present

PROCEEDINGS IN CHAMBERS:

After reviewing the habeas petition and files and records in this action, the Court has determined that it will delay he issuance of a Report and Recommendation with respect to this petition until after the California Supreme Court decision in People vs. Lee (No. SO 94597) See: People v. Lee 85 Cal. App. 4th 706, 102 Cal Rptr. 403 (2000), petition for review granted. 105 Cal. Rptr 2nd 789 (2001) Lee was

fully briefed as of June 28, 2001, and is waiting calendaring for oral argument.

The issue before the California Supreme Court in Lee is whether an aider and abettor must share the perpetrator's premeditation in order to be convicted of premeditated attempted murder. The Court of Appeal for the Fifth District in Lee and the Court of Appeal for the Fourth District in its opinion affirming petitioner's conviction People v. Laster 52 Cal. App 4th 1450, 61 Cal. Rptr. 2d 680 (1997) reached diametrically opposite conclusions on this issue. It appears to the Court that resolution of this issue may have bearing on petitioner's claims in this action.

The parties may, but are not required to, submit supplemental briefs addressing the pertinence of Lee to petitioner's claims.

cc: District Judge Robert J. Timlin

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ITEM 12

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. : EDCV 98-0052 RT (MAN)

Date: May 15, 1998

DOCKET ENTRY: COURT CONSTRUES SUPPLEMENAL POINTS FILED BY PETITIONER AS TRAVERSE ND ORDERS THE CASE SUBMITTED.

PRESENT: THE HONORABLE MARGARET A. NAGLE, U. S. MAGISTRATE JUDGE

Earlene Carson	N/A
Deputy Clerk	Tape No./Court Reporter
ATTORNEYS PRESENT FOR PETITIONER	ATTORNEYS PRESENT FOR RESPONDENT (S);
None Present	None Present

PROCEEDINGS IN CHAMBERS:

On May 13, 1998, petitioner's counsel filed a " Supplemental Points and Authorities in Support of Petition for writ of habeas corpus " ,the court's order of March 11 1998, required the filing of a Traverse after the filing of a return which, in this case occurred on April 23, 1998.

Therefore, the court will construe the pleading filed by petitioner as his Traverse, and the case is hereby deemed under submission, unless the court otherwise orders.

cc: All Parties of Record